



May 23, 2001

Ms. Ruth H. Soucy  
Deputy General Counsel  
Open Government  
Comptroller of Public Accounts  
P.O. Box 13528  
Austin, Texas 78711-3528

OR2001-2134

Dear Ms. Soucy:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 147593.

The Comptroller of Public Accounts (the "comptroller") received a request for information pertaining to pending sales and use tax refund claims that are based on the decision in *Day & Zimmerman, Inc. v. Calvert*.<sup>1</sup> You state that the comptroller has already released some responsive information to the requestor. We assume this includes all responsive information made public under section 552.022 of the Government Code. See Gov't Code § 552.022(a)(14). You contend that the remaining requested information is excepted from disclosure under sections 552.101, 552.103, 552.107(1), and 552.111 of the Government Code.<sup>2</sup> Because we resolve your request under section 552.103, we need not address the applicability of the other exceptions you raised.

Section 552.103(a) excepts from disclosure information relating to litigation to which a governmental body is or may be a party. The governmental body has the burden of providing relevant facts and documents to show that section 552.103(a) is applicable in a particular situation. In order to meet this burden, the governmental body must show that (1) litigation is pending or reasonably anticipated, and (2) the information at issue is related to that litigation. *University of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479 (Tex.

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<sup>1</sup>519 S.W.2d 106 (Tex. 1975), *cert. denied*, 423 U.S. 832 (1975).

<sup>2</sup>The requestor also seeks certain comptroller decisions, the identification of which, you state, would require the comptroller to conduct legal research. See Gov't Code § 552.227. You state that you have referred the requestor to the comptroller's website that contains the requested comptroller decisions.

App.--Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990).

You inform us that there are a number of cases pending in the comptroller's Administrative Hearings Section that deal with the issue of taxability of federal contractors. This office has determined that a contested case under the Administrative Procedure Act, Government Code chapter 2001, constitutes "litigation." See Open Records Decision Nos. 588 (1991) (former State Board of Insurance proceeding), 301 (1982) (hearing before Public Utilities Commission). Accordingly, we conclude that you have demonstrated that litigation is currently pending for purposes of section 552.103(a).

With regard to whether the requested information relates to the pending litigation, you inform us that the requested information deals with the issues addressed in the *Day & Zimmerman* case. Furthermore, you have submitted to this office correspondence from taxpayer representatives involved in contested cases before the comptroller which reference issues arising out of the *Day & Zimmerman* case as being relevant to their respective proceedings. We therefore conclude that the information at issue "relates" to the pending litigation for purposes of section 552.103(a). Accordingly, the requested information may be withheld from the requestor at this time under section 552.103(a) of the Government Code.<sup>3</sup>

In reaching this conclusion, we assume that the taxpayers with *Day & Zimmerman* cases currently pending with the comptroller have not had prior access to the records at issue. Once information has been obtained by all parties to the litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. Open Records Decision Nos. 349 (1982), 320 (1982). We also note that the applicability of section 552.103(a) ends once the litigation has concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the

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<sup>3</sup>In reaching our conclusion here, we assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. See Open Records Decision No. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the General Services Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Michael A. Pearle  
Assistant Attorney General  
Open Records Division

MAP/RWP/er

Ref.: ID# 147593

Enc.: Submitted documents

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